

1 MR. HUTTON: From Telemundo to Mr. Gilbert?

2 THE COURT: Oh, I'm sorry. I thought you meant to  
3 Ms. Swanson.

4 MR. HUTTON: No. We don't care about their  
5 conversations with them.

6 THE COURT: Oh, okay. I hear you. Go ahead.  
7 Just hold on a second. All right. Okay.

8 MR. HAYS: I mean, this is another -- I mean at  
9 some point, Your Honor, this is another added burden on us.  
10 I mean, if Your Honor --

11 THE COURT: Yes. I'm agreeing with you. Let's  
12 find out what you can do with respect to Ms. Swanson and Mr.  
13 Gilbert on this telephone business. Let's find out exactly  
14 what -- you know, let's see how easy or difficult it is to  
15 get this or if it's feasible.

16 I'm just inclined -- the reason is I think if  
17 there's going to be any important calls made, it's going to  
18 be with respect to in terms of moving something along that's  
19 relevant to this case. It's going to be between Ms. Swanson  
20 and Mr. Gilbert. I don't think it's going to be somebody in  
21 Telemundo.

22 MR. HUTTON: I'm not sure. I think Ann Gaulke is  
23 very heavily, personally involved in this matter. And I  
24 don't think --

25 THE COURT: I don't remember Mr. Gilbert

1     testifying about her at all.

2             MR. HUTTON: Well, that's why it's so relevant.  
3     You know, the purpose of most of this is to test the story  
4     we've been given on this.

5             MR. HAYS: Well --

6             THE COURT: Let him finish.

7             MR. HUTTON: Let me finish. And I don't think Ms.  
8     Swanson would be likely to call Mr. Gilbert, directly.  
9     She'd be more likely to call his counsel, Mr. Cole or Mr.  
10    Gilbert. So I'm not expecting much to show up in the way of  
11    calls from Ms. Swanson directly to Mr. Gilbert. But I think  
12    the phone calls from Ms. Gaulke or Mr. Meadow to Mr. Gilbert  
13    would be more enlightening.

14            THE COURT: Is Mr. Meadow with Telemundo?

15            MR. HUTTON: Yes.

16            MR. HAYS: Well, Your Honor, I think there ought  
17    to be some -- I mean, this is already, maybe, a  
18    substantial -- in addition to everything else we've already  
19    done or Telemundo has already done here, and also  
20    considering as apparently the case, there was no testimony  
21    by Mr. Gilbert regarding this.

22            There ought to be some level of -- some showing of  
23    necessity, other than sort of pure speculation before we're  
24    subjected to this kind of additional --

25            THE COURT: All right. Here's my ruling on that.

1 See, at this posture of the case -- and we're at the hearing  
2 now. We're really past discovery and we're at the hearing,  
3 Ms. Swanson's going to be on the stand. I want you to be in  
4 a position to ask her every question that you possibly can  
5 that relates to this appraisal that she has knowledge of.

6 And a way to test her recollection or even to help  
7 her recollection is with the information that we're getting  
8 at now. We start bringing in other people who have not been  
9 designated as witnesses in this case, then we're back into  
10 discovery again. And I don't want that to happen. In fact,  
11 I'm not going to let that happen. It's just too -- right  
12 now, it's just too late. So, okay. You've got my ruling on  
13 that, Mr. Hays.

14 MR. HAYS: Thank you.

15 THE COURT: Now, with respect to -- what did we  
16 just get finished with -- telephone records, we've gone  
17 through the calendar, billing records -- billing records,  
18 billing records. Are there other appraisals of that station  
19 that she would have worked on or would have some connection  
20 with?

21 MR. HAYS: I have no idea, Your Honor. I don't  
22 know of any, but I don't know one way or the other.

23 THE COURT: All right; because that is not  
24 directly -- certainly, it's not directly relevant. It might  
25 be relevant if it was a -- if some other appraisal were used

1 in conjunction with discussions with Mr. -- between Mr.  
2 Gilbert and Ms. Swanson.

3 That would be something else again. But where  
4 we're really focused on is the appraisal that was being done  
5 in conjunction with Adams and the station. Now, billing  
6 records that tie into that, how big of a job would that be?  
7 You'd have to look at the billing recording for what, for  
8 Telemundo's billing records?

9 MR. HAYS: Yes, you've have to look at Telemundo's  
10 billing records. And they are a client of the firms. I  
11 mean, we do --

12 THE COURT: Right.

13 MR. HAYS: -- these things are done by, you know,  
14 by client number. And I just don't know -- I don't know if  
15 there was a separate -- I doubt it, but I don't know for a  
16 fact whether or not there was a separate number for the, you  
17 know, for the appraisal. I doubt it.

18 It's probably stuck in the general corporate  
19 number for Telemundo, in which case you'd have to look  
20 through all of the entries for Telemundo to determine if  
21 there was any reference.

22 THE COURT: Well, I'm sorry. It's only eight  
23 months. You know, are there itemized bills sent out on a  
24 monthly basis?

25 MR. HAYS: Yes, we do bill -- we try to bill on a

1 monthly basis.

2 THE COURT: All right.

3 MR. HAYS: We also try to get paid on a monthly  
4 basis. So --

5 THE COURT: The best of all possible worlds.  
6 Well, couldn't a paralegal or somebody just go through eight  
7 months of billing and see if something pops up? Or is --

8 MR. HAYS: And what is -- exactly are they looking  
9 for, reference to an appraisal, some entry, time entry that  
10 references the appraisal?

11 THE COURT: Yes, work done by Ms. Swanson. Or is  
12 there another attorney? I sorry. When I say Ms. Swanson, I  
13 mean any -- Ms. Swanson and any other attorney at the firm  
14 that's working on this with her.

15 MR. HAYS: Again, Your Honor, that sort of  
16 complicates it. Whether or not Ms. Swanson even recalls  
17 whether or not there was some attorney in some way that was  
18 involved with this, I mean, Ms. Swanson -- I think it's fair  
19 to say Ms. Swanson was the principal attorney. And so I  
20 would suggest we limit it to her.

21 MR. HUTTON: Your Honor, I'd like to speak to  
22 that. I'm familiar with how they bill, because I used to  
23 work there. And --

24 MR. HAYS: It's exculpatory information. You  
25 can't use some.

1 THE COURT: That will be the next lawsuit. Do you  
2 have any objection to him talking about this, Mr. Hays?

3 MR. HAYS: Well, I don't know. I would kind of  
4 have to think about this. I'm going to have to think about  
5 whether or not Mr. Hutton can use information that he  
6 obtained as a partner in the firm, you know, to help out  
7 somebody who's now suing us. So --

8 THE COURT: Well --

9 MR. HUTTON: Well, there's no confidential  
10 information here. This is how all law firms that I know of  
11 bill. You send out bills under the particular client  
12 number. And within that number, you may segregate out  
13 different matters. And you send them out on a monthly  
14 basis.

15 There's a fairly, you know, concise statement of  
16 what work was done and by whom it was done and the amount of  
17 time that was spent. Sidley and Austin records you've seen,  
18 I think. Bechtel and Cole records you've seen. These would  
19 be the same.

20 The privilege log notes that Ann Swanson, Kevin  
21 Reed, and Elizabeth McGenry from Dow Lohnes were all  
22 involved in this at various times. And the billing records  
23 will show who was doing what. You don't have to segregate  
24 it out.

25 And I would suggest you follow the same protocol

1 of producing anything that's referring to Adams, Gilbert,  
2 Cole, Bechtel, or the appraisal.

3 THE COURT: All right. I think that's -- for that  
4 period of time, I think that's, unless I'm missing  
5 something, I don't think that that's overly burdensome. So  
6 we've got calendars. We've got billings. And we had  
7 telephone records to the extent that that is at all  
8 feasible. And then, the last categories are the privilege  
9 notes or, I guess, really the notes.

10 And you're saying, if I heard you correctly the  
11 first time -- and I think I did -- you're really putting Ms.  
12 Swanson's notes into two categories, a category where she  
13 tears it off the pad and puts it in the client's file.

14 MR. HAYS: Yes. There may be some instances where  
15 that occurred. Again, Your Honor, I do not know. I know  
16 that she keeps notes on a file in, what I would call,  
17 something of a loose-leaf file.

18 I guess loose-leaf's not the right term, but in a  
19 standard 8 and a-half by 11 file. And those notes are, as I  
20 understand it, not necessarily -- some of those are not  
21 necessarily placed in the client's file, that she just keeps  
22 them separate.

23 THE COURT: The difficulty that I'm having with  
24 this is I don't know what -- and apparently you don't know,  
25 either -- I can't make any kind of a cut on how burdensome

1 it is to go after those notes that don't go in the file,  
2 because I keep thinking to myself, well, there must be some  
3 kind of a system. But you're not able to articulate that.

4 MR. HAYS: Well, I think my understanding of the  
5 system is that it's not -- she didn't segregate the files  
6 separately for the appraisal. I mean, she doesn't have a  
7 file that says "Appraisal Notes" with it. It's -- she may  
8 keep them in terms of the client. I, frankly, at this  
9 juncture, Your Honor, I'm not sure exactly how those notes  
10 are kept.

11 THE COURT: Well, maybe you can talk to her about  
12 it. There must be some way that she would be able to  
13 retrieve something if she needed it. Otherwise, you might  
14 just as well throw them out. I mean --

15 MR. HAYS: Well, as I say, there is a system she  
16 employed. But how burdensome it is to, you know, if she  
17 keeps all of her Telemundo records, for example, there could  
18 be hundreds, if not thousands, of pages of those notes --

19 THE COURT: But not for --

20 MR. HAYS: Pardon?

21 THE COURT: I was going to say not for an  
22 eight-month period, unless she was working on some mammoth  
23 project.

24 MR. HAYS: I just don't know, Your Honor.

25 THE COURT: Well, I know less than you do. Well,



1 I'm going to ask you to report back on that one. And it's  
2 on the burdensome list now. If we get into privilege,  
3 that's something else, again.

4 MR. HAYS: Well, these things will all be -- I  
5 mean, we're going to be claiming a privilege on confidence  
6 as to virtually all these notes, because that's the other  
7 part of this, Your Honor, that these are notes that she  
8 makes that reflect her internal thought processes,  
9 conversations with clients, and what she even decides to  
10 take to make notes of, because that reflects her thought  
11 process as to what's important, what's not important. So I  
12 think these are all presumptively privileged. And, I mean,  
13 they are all going to wind up on a privilege log, frankly.

14 THE COURT: Well, I can understand that. But a  
15 lot of them might have to do -- I mean, if it's just a  
16 question of her taking notes down as opposed to recording a  
17 privileged conversation or a work product where there's  
18 litigation involved or perspective litigation involved,  
19 there's not a blanket privilege if someone writes it down.

20 MR. HAYS: Absolutely. That's correct, Your  
21 Honor. But as I say, I mean, attorney's notes are, I think,  
22 generally considered sort of a core of what constitutes work  
23 product and attorney-client privileged communications. And  
24 so, I mean, I haven't reviewed those notes. But I'm  
25 confident that they reflect both attorney-client

1 communications, as well as work product.

2 THE COURT: Well, I would suspect -- I wouldn't be  
3 surprised at all to see a mix in the -- in a mixed bag. I  
4 mean, these are very critical. These are notes. Lawyers  
5 are, in a sense, very -- and I would -- I'm treating them  
6 that way. But we've got to know -- first got to see what  
7 we're dealing with, exactly.

8 Well, again, for that period of time, unless you  
9 can come back and make a showing of burdensomeness based on  
10 your -- you know, going through this process with Ms.  
11 Swanson, I would ask -- require that the same thing be done  
12 with respect to her notes. And then, of course, the next  
13 phase -- next stage would be for me to take a look at them.

14 MR. HAYS: And, Your Honor, it's the same  
15 categories; that is, Adams, Gilbert, Cole, Bechtel, and the  
16 appraisal.

17 THE COURT: Exactly. Exactly. And, again, for  
18 that period of time, 1 March to 31 October.

19 MR. HAYS: Right.

20 THE COURT: Now, again, with all due respect, I  
21 asked you to go back and reconsider the position on the  
22 billings. I think the billing -- I think the law on the  
23 billings is pretty clear, and also the law with respect to  
24 the subject matter of a conversation or a topic.

25 So if it's a recording of time with respect to the

1 client and the attorney on the billing records and it shows  
2 what the subject was that was discussed, I'm very confident  
3 in terms of my understanding of the law that that's just not  
4 going to be protected. If you're going into the substance  
5 of the conversation, then we're talking about something  
6 different.

7 MR. HAYS: I have litigated the issue of privilege  
8 in a similar context. And I'm pretty confident, if memory  
9 serves, Your Honor, that there is cases that have held that  
10 the subject matter of an attorney-client communication can  
11 indeed be privileged.

12 For example, if someone is charged with a crime  
13 and the question is an intent issue about whether or not he  
14 intended to defraud somebody, and then prior to the time  
15 that he made representation he had consulted with a lawyer,  
16 and the subject matter of that conversation somehow involved  
17 the misrepresentation, I think you might have a very good  
18 claim, for example, that that was a privileged -- that the  
19 subject matter itself was privileged. And I'm confident  
20 there are cases that say that. Whether or not these billing  
21 records -- it depends on exactly what they say, obviously.

22 THE COURT: Sure.

23 MR. HAYS: But I will add, Your Honor, that  
24 there's another level of burdensomeness here. We have to  
25 redact this. I mean, we would redact the, certainly, the

1     you know all of the non-relevant -- I mean, when you get one  
2     of these pages from these bills, you redact the stuff that  
3     doesn't have anything to do -- there's a burden.

4             You've got to redact any of the information  
5     regarding the rates that are charged, because that's  
6     confidential firm information. And it's not just a thing of  
7     going through and finding something. It's got to be  
8     analyzed, redacted.

9             I mean, there's a time element in each of these  
10    things that it takes a lot more time than you think. I  
11    mean, it really is a burden here. And that's why I still  
12    think Mr. Hutton's client ought to pay us for it.

13            THE COURT: Well, you know, I don't think that --  
14    I haven't heard you -- as much of a burden as it is, and I'm  
15    not at all -- I mean, I'm not at all happy coming at this  
16    issue this way at this particular time, but notwithstanding  
17    everything that I've got said, I don't see in light of the  
18    focus of the information and the relatively short time frame  
19    -- and I'm prepared to work with you as best I can to  
20    accommodate deadlines and additional showings of  
21    burdensomeness -- I don't think that this falls into that  
22    category.

23            MR. HAYS: Well, I mean, we've now got four  
24    separate categories here, Your Honor, that we have to go  
25    back and do. I mean, so it's adding up.

1           THE COURT: Well, you know, I don't -- I can't say  
2 anything more than I've said. I, certainly, don't want to  
3 start a contest with respect to assessing fees for one  
4 thing. But even if I -- I'm not much averse to it as I am.  
5 And I don't think that the standard has been met. I just  
6 don't think that this is the case for that issue.

7           I can understand why you're advocating it. I  
8 mean, that's clear. And you're doing a fine job of it. But  
9 let's take it one -- let's just take it to this next stage  
10 and see what we get. Now, what we had to do is we had to  
11 come up with a time frame on this. And I understand, you  
12 know, I don't want to have people going in the office over  
13 the holidays and having to pull things together.

14          MR. HAYS: I can tell you that Ms. Swanson's out  
15 of town for the weekend. She's got client matters already  
16 previously scheduled, a major contract that she has for  
17 review next week. So, I mean, I don't think she can do any  
18 of this, frankly, by next week, Your Honor.

19          THE COURT: I think we're going to be starting  
20 this hearing. This phrase three doesn't come up until after  
21 we finish phase two. So it's not going to be -- we don't  
22 have to be a hundred percent ready on all of this on the  
23 12th. And also, we have to work out the date of her  
24 appearance as a witness. The subpoena that she will be  
25 served with has the 19th of June. Am I correct on that?

1 MR. HUTTON: That was our -- that was the 19th.  
2 And that was our best estimate.

3 THE COURT: That's your best estimate at this  
4 time?

5 MR. HUTTON: Yes.

6 THE COURT: Again, I'm sure Mr. Hutton will, and I  
7 certainly will, work around -- we're going to work around  
8 Ms. Swanson's schedule. And we're going to work around how  
9 the rest of the case is progressing. We're going to work  
10 around several things, so there's no one date cast in stone.  
11 But I'm confident that she will testify sometime in June, at  
12 least we intend that.

13 Now, I'm hoping that we don't get into a situation  
14 where we're going to have to deal with some kind of a motion  
15 to quash that subpoena. I'm not going to ask you to commit  
16 yourself right now. But the issues that -- believe me,  
17 there's been a lot of reflection done on this issue.

18 Mr. Bechtel and Mr. Cole insisted that I look at  
19 it twice which is not too unusual. And I have heard Mr.  
20 Gilbert's testimony in this case. There's no mystery here  
21 in terms of what I think to be the relevance of that  
22 particular -- what I've heard about that issue.

23 All we're trying to do is we've got Mr. Gilbert's  
24 side of the story. And we want to get the other side of the  
25 story. And I'm not saying that Ms. Swanson is the only

1 relevant witness, but she's the one whom he identified. And  
2 she's the one that Mr. Hutton has focused on.

3 And it's too late in the scheme of things to stop  
4 and try and think if there's somebody better we could use.  
5 So that's where I am on that. It's going to be very  
6 difficult to get me to change my mind on that.

7 And I think that the best way to approach this  
8 would be to try and do it as amicably as we possibly can, so  
9 that Ms. Swanson gets in here and out of here as quickly as,  
10 certainly, as we can do it.

11 MR. HAYS: Well, obviously, this is the first I've  
12 heard of her being subpoenaed, Your Honor. So I haven't had  
13 a chance to talk with her about it. I have no idea her  
14 position on this, which is obviously one thing that we have  
15 to consider. But we'll certainly cooperate with the Court  
16 and Mr. Hutton.

17 But as Your Honor has pointed out, this will pass  
18 the discovery stage here, as well, and there ought to be --  
19 we're past the stage, as I understand, of her fishing  
20 expeditions. And there ought to be some showing of  
21 relevance.

22 And the question should be fine-tuned to go to  
23 what it is that her testimony is expected to address. So  
24 I'll just have to talk with her. And then, we haven't even  
25 gotten the subpoena yet. And I'll get back here to Your

1 Honor on --

2 THE COURT: Well, I will tell you what I intend  
3 the burden to be in this as far as the -- Mr. Hutton calling  
4 her as a witness. And that is, first of all, you and she  
5 are going to know ahead of time exactly what documents he  
6 intends to question her on. Okay. And there already has  
7 been so much articulation in terms of the issue and what, in  
8 fact, I delineated.

9 I very carefully delineated the four elements of  
10 the issue. So there shouldn't be any surprise in terms of  
11 the subject matter at what we're getting at. And all that  
12 I'm interested is getting her side of the story. That's  
13 all. So, you know, anything else that we can do to make it  
14 even more specific between then and the time she testifies,  
15 I'm willing to do it.

16 MR. HAYS: Thank you, Your Honor.

17 THE COURT: No blind-siding in this case. At  
18 least it hasn't happened yet. I don't think it's --

19 MR. HUTTON: I don't think so, Your Honor.

20 THE COURT: I'm the only one who gets blind-sided.

21 MR. HAYS: Your Honor, regarding our response to  
22 these four categories of additional --

23 THE COURT: Well, I'm going to get back to that.  
24 You said you can't do it next week. And I understand that.  
25 How about the following week?



1           MR. HAYS: Your Honor, may I? The following week,  
2 towards the end of the following week may be doable. It may  
3 be doable. I'm just going to have to talk to Ms. Swanson.  
4 It's probably doable for some of them.

5           THE COURT: Well, let me do this: Let me set -- I  
6 have to set things down or --

7           MR. HAYS: I understand, Your Honor.

8           THE COURT: -- let me set it down for the 9th of  
9 June. All right.

10          MR. HAYS: What day of the week is that, Your  
11 Honor?

12          THE COURT: That's on a Friday. That's the Friday  
13 before we start in this proceeding. In fact, what I'm going  
14 to do is I'm going to back up one day. Let me do it the  
15 8th. I'm sorry to do that to you but then, at least, will  
16 give me a free day to take a look at the situation before we  
17 get cranking on the 12th. The 12th's going to be an  
18 admission day, so that's going to be a very, very busy day.

19          On the 8th, here's what I want. I want to put in  
20 the order that you provide that Telemundo -- I'm not going  
21 to direct the order to Ms. Swanson. I'm going to direct it  
22 to Telemundo, provide this information as we delineated it  
23 here by close of business on June 8th and/or a status report  
24 with respect to anything that is not being produced on that  
25 date. All right.

1           And then, somehow in the middle of -- you know, I  
2   mean, we'll just get back to it as we have to. We'll just  
3   get back to it if we have to. Yes, sir?

4           MR. HUTTON: One suggestion. I would say that to  
5   the extent that Mr. Hays is claiming privilege as to any of  
6   these additional documents, he ought to provide a privilege  
7   log and produce them for in-camera inspection by the same  
8   day.

9           THE COURT: All right. Well, that's a good point.  
10   I think that I was going to say that goes without saying.  
11   But, yes, that's absolutely right. And I have to, then,  
12   figure out what I'm going to do about looking at some of  
13   this. I'm just not ready to make a cut on that. I've seen  
14   your privilege log. And have you looked at the documents in  
15   the privilege log, sir?

16          MR. HAYS: No, Your Honor, I haven't looked at all  
17   of them. I've looked at some of them.

18          THE COURT: For example, on the first page of the  
19   privilege log going down to the second item on July 22,  
20   1999, it identifies a letter. Well, it's going to the  
21   Secretary of the FCC. But there is documents otherwise  
22   produced. Am I to believe that it was produced in this  
23   case?

24          MR. HAYS: Yes, yes.

25          THE COURT: So the only thing that says produced

1 here --

2 MR. HAYS: It means it's been produced. It's  
3 either been produced already, or it will be produced  
4 tomorrow. There was some handwriting that was, as indicated  
5 in the inscription, Your Honor, there was some handwriting  
6 that was redacted that was attorney work product. And so  
7 the handwriting was redacted, but the document was otherwise  
8 produced.

9 THE COURT: And with respect to the work product,  
10 there's really only two that are clean. When I say clean  
11 work product, I mean which are solely asserted as to work  
12 product. Is it the contention that all these documents were  
13 prepared with litigation in mind or in the context of  
14 litigation?

15 MR. HAYS: I'd have to take a look at them, Your  
16 Honor. The privilege log was marked or prepared by  
17 Philadelphia counsel, who had reviewed these. So I can't  
18 honestly answer that question at this point.

19 THE COURT: And then, they do have a category in  
20 here -- you do have a category in here for billing records.

21 MR. HAYS: Yes. At the end, Your Honor, we put  
22 the --

23 THE COURT: Personal calendars. Well, we've  
24 covered all of that today, anyway. We have. And then, up  
25 on top on July 14th, there's a --

1 MR. HAYS: Where's that?

2 THE COURT: I'm on the last page now, a letter  
3 discussing FCC renewal proceeding and legal memo. That did  
4 go to Ms. Gaulke who is -- she is with Telemundo; is that  
5 right?

6 MR. HAYS: That's correct, Your Honor.

7 THE COURT: Interesting. You know what interests  
8 me, too, is that there seems to be so much interest in this  
9 renewal proceeding. And yet, you know, you're -- that's  
10 fine. It's an -- argument. But, you know, you're a  
11 non-party, and it sounds like you're, you know, you're  
12 making it appear that, you know, you have no idea as to  
13 what's going on around here. But you seem to have a lot of  
14 ideas. I mean --

15 MR. HAYS: Well, probably Ms. Swanson has a better  
16 idea than I do, Your Honor, frankly. I think it's fair to  
17 say, I mean, at one time, I mean, this -- Reading, of  
18 course, is an affiliate of theirs at one -- so there's a lot  
19 of --

20 THE COURT: Okay. Yes.

21 MR. HAYS: It's pursuing -- there's some --

22 THE COURT: There is some overlap, in that  
23 context, overlap. I'll tell you what I'm going to do,  
24 though. I'm also going to include in that order, I'm going  
25 to ask to see in-camera those two pure work-product

1 documents. And I'm going to ask you to, you know, to make a  
2 showing as to why the work-product -- why work product  
3 applies. And I'm not -- yes, I'm going to tell you exactly  
4 what I'm talking about.

5 MR. HAYS: Okay.

6 THE COURT: Let's see. It's undated. It's on the  
7 third page, right smack in the middle of the third page of  
8 your log. It's undated. And --

9 MR. HAYS: TD-635, Your Honor?

10 THE COURT: TD-635; right. TD-635 is still  
11 identified. And I saw more than one that was -- just a  
12 minute.

13 (Pause.)

14 THE COURT: Now, I think that's the only one that  
15 -- the others all have -- well, I'm not interested in what  
16 went to the Commission Secretary. That's already been  
17 turned over, anyway. And the other documents all look like  
18 they are tied in with the client. So for the time being,  
19 I'm just going to limit to that document. And I'm going to  
20 wait until we see everything that comes in on the 8th, and  
21 then make a determination as to what I want to do about  
22 getting into an in-camera review of these documents.

23 MR. HAYS: So you want me to, Your Honor, produce  
24 this one on the same date as the other one that was --

25 THE COURT: Yes.

1 MR. HAYS: -- on June --

2 THE COURT: On June 8th.

3 MR. HAYS: I'm sorry, on June 8th. That's wishful  
4 thinking on my part.

5 THE COURT: I'll be happy for July.

6 MR. HAYS: June 8th.

7 THE COURT: June 8th.

8 MR. HAYS: And you said as well, Your Honor, you  
9 want something accompanying that that explains our position  
10 with respect to why it is work product?

11 THE COURT: That's correct. That's correct, which  
12 means that you have to meet the standard of anticipation of  
13 litigation.

14 MR. HUTTON: Your Honor, I may have misunderstood.  
15 I thought they were supposed to produce all of the documents  
16 in the log for in-camera review.

17 THE COURT: Well, yes. If they had to produce --  
18 the purpose of the log is to point out what documents that  
19 have been withheld and for what reason. It doesn't mean  
20 that they necessarily get reviewed in-camera. If the  
21 document is clearly a letter going from Ms. Swanson to Ann  
22 Gaulke discussing FCC renewal proceedings, then unless  
23 there's some reason to think that that's not true --

24 MR. HUTTON: Well, no. I don't doubt anything  
25 that's stated here. But attorney-client privilege is

1       supposed to protect confidences from the client to the  
2       attorney.

3               THE COURT: That's true.

4               MR. HUTTON: And if the attorney is writing a  
5       letter saying I had a conversation with Howard Gilbert,  
6       here's what happened, then that's not privileged  
7       information. So I'd like you to review all of these  
8       documents.

9               THE COURT: You want me to review all these  
10      documents?

11              MR. HUTTON: I would like you to. I'm not going  
12      to question Mr. Hays' good faith, but I think it would be  
13      helpful. I think you did that with Sidley and Austin. And  
14      I think it would be helpful.

15              MR. HAYS: Well, I would suggest that Your Honor  
16      take a look at the privilege log -- and we only produced it,  
17      obviously, at noon today -- and make a determination as to  
18      which one Your Honor wants to review in-camera in light of  
19      all the circumstances. And we'll obviously produce whatever  
20      Your Honor wants us to produce in-camera.

21              THE COURT: Well, let me hear this very briefly,  
22      because now I have the specific request to make this  
23      in-camera review. What would be -- do you want to make an  
24      argument on?

25              MR. HAYS: Well for example, Your Honor, I mean,

1 to Ann Gaulke from Ann Swanson, I mean, I think that's  
2 presumptively --

3 THE COURT: All he's offering -- you've got the  
4 presumption.

5 MR. HAYS: And it just seems to me that these are,  
6 despite the fact that they are held for in-camera review,  
7 they are nonetheless attorney-client communications and are  
8 confidential in that sense. And so I think before the Court  
9 undertakes that review, there ought to be some basis for  
10 concluding that the privilege doesn't apply.

11 THE COURT: I want to be sure that I understand  
12 that. Now, you did tell me this once before that this log  
13 is not only -- not only covers the documents that have been  
14 turned over to Ms. Gaulke, but cover the documents that were  
15 turned over --

16 MR. HAYS: Yes. The privilege log includes all  
17 documents that are relevant to the subpoena that are  
18 privileged. Now, there are some documents that are produced  
19 -- that will be produced in this 2,800 pages of documents  
20 that may not be relevant to the subpoena.

21 And if there was a privileged document that was  
22 not relevant to the subpoena, because if you look at the  
23 document request, there were certain document requests in  
24 that other proceeding that really had nothing to do with the  
25 subpoena, but so we have included those privileged documents



1     that are not called for in the subpoena, obviously, in our  
2     privilege log in the subpoena. But they do include all  
3     privileged documents that, otherwise, would have been  
4     produced pursuant to the subpoena.

5             THE COURT: Do you follow that, Mr. Hutton?

6             MR. HUTTON: I do, Your Honor. But I would -- I'd  
7     like to suggest that we just follow the same procedure that  
8     we did with Sidley and Austin. You'll recall that Sidley  
9     and Austin produced a privilege log and you asked them to  
10    produce the documents for in-camera review.

11            You found that some of those documents for which a  
12    privilege was claimed were not privileged, and therefore  
13    ordered them to be produced. And it seems to me we're in  
14    the same situation here. And we can get the discovery  
15    process moving if we do that now.

16            THE COURT: All right. You've convinced me. When  
17    can you have these to me for in-camera inspection? I'm  
18    thinking as early as tomorrow.

19            MR. HAYS: I can't get them to you tomorrow, Your  
20    Honor.

21            THE COURT: Okay. All right.

22            MR. HAYS: Wednesday next week.

23            THE COURT: Pick a day next week. Wednesday?

24            MR. HAYS: Wednesday. Maybe, I can give myself  
25    till Thursday if Your Honor is amenable to that.

1 THE COURT: Try and do it Wednesday.

2 MR. HAYS: Wednesday.

3 THE COURT: But I'll put the order by Thursday.

4 And whoever's going to handle getting them over here, he or  
5 she call my legal tech and coordinate it, the physical  
6 passing of the documents at the gate out here.

7 MR. HAYS: Now, Your Honor, I'm not familiar with  
8 Your Honor's procedures on this, but there may come a -- if  
9 Your Honor does come to a conclusion that the documents  
10 should be disclosed, despite the fact they are on the  
11 privilege log, we would like an opportunity to present our  
12 side of the story to Your Honor.

13 THE COURT: You will. You will. You will. If I  
14 make a determination that one or several of the documents  
15 don't meet the standard, in fact, when you give it to me on  
16 -- when you give these documents to me on, what we said, by  
17 next Thursday I would expect that you would give me some  
18 brief on points and authorities.

19 It doesn't have to be exhaustive, but at least  
20 something, groups of documents saying these particular  
21 documents have these characteristics which are clearly  
22 within, you know, the confines of the protection letter,  
23 whatever purpose it is.

24 So I'm assuming that there's going to be some  
25 legal analysis on what I'm going to get. And then, I would

1 make the determination and say five of these -- I don't  
2 agree with you on five of these. You know, then I would  
3 issue an order saying that, you know, why.

4 And I don't know what your answer might be after  
5 that. But I'm very sensitive to the privilege. And I'm  
6 only doing this because Mr. Hutton wants me to do it. But  
7 you'll still have a chance to respond. But you'll have to  
8 do it fast.

9 MR. HUTTON: I'll keep my pen ready.

10 THE COURT: Yes. Well, I wanted -- because,  
11 again, we're going to start this, you know, at the start of  
12 business on -- well, let me -- on the 12th and we're going  
13 to have it -- let me back up a little bit. I'm going to  
14 have it by the 1st.

15 So, certainly, by the -- and I'll start looking at  
16 them in light of the authorities that Mr. Hays is going to  
17 give me. And if he comes in on Wednesday, then I'm going to  
18 require something responsive by Friday. If he comes in on  
19 Thursday, then you have until Monday. All right?

20 MR. HAYS: Okay. So you want me to serve Mr.  
21 Hutton with my --

22 THE COURT: Yes, please do with documents. And as  
23 I've indicated in my other orders, you know, do it all by  
24 fax or E-mail, or something. Don't -- I think I can get an  
25 order out that accounts for all of this. But why don't I do

1       this? I'm going to do it on -- I'm just going to set it  
2       down in the order for the 1st.

3               If you can come in on Wednesday the 31st, I would  
4       appreciate it. And then, you know, it will go without  
5       saying that I'll expect something to come in on Friday. Can  
6       you give --

7               MR. HUTTON: Well, can you tell me whether it's  
8       one business day or two business days that you want it?

9               THE COURT: Well, I'm just going to work with  
10      business days. That's all. That's all. Can you get it to  
11      me by the close of business on Friday? I can work on it on  
12      Monday. If you get it to me the close of business on  
13      Monday, then I can't look at your thing until Tuesday.

14              MR. HUTTON: Right. Okay.

15              THE COURT: So either way, it's going to get  
16      looked at. Then, I can go ahead and -- all right. I've  
17      said enough about that. Mr. Bechtel, you've been relatively  
18      quiet on this. Is there anything that you wanted to add?  
19      Or is there anything that --

20              R. BECHTEL: I'm sorry. I didn't hear you.

21              THE COURT: Did you want to add anything to this?  
22      Or --

23              MR. BECHTEL: No, sir. I don't want to do that.

24              THE COURT: Does anybody have anything more on  
25      that? You heard what I said. I think you heard what I

1     said, Mr. Hutton, that before Ms. Swanson takes the stand, a  
2     reasonable period before she takes the stand, she's going to  
3     have to have a list of all the documents that you intend to  
4     cross-examine her with. She will be coming in.

5             You're absolutely -- I will grant you the right to  
6     treat her as a hostile witness. So you'll be effectively  
7     cross-examining her. But she's to have every notice of  
8     every document, unless of course it comes up to a situation  
9     where there's, you know, it's a question -- if you get  
10    testimony that you're not anticipating and it's a question  
11    of either, you know, you have some document that will either  
12    refresh her recollection or, you know, traditional use of  
13    that type of evidence, but in terms of what you intend to  
14    ask her when she hits the stand, she should have, all right,  
15    knowledge of that ahead of time.

16            MR. HUTTON: I understand.

17            THE COURT: Okay?

18            MR. HAYS: Your Honor, in regards to the  
19    determination about treating her as a hostile witness, we  
20    would submit, Your Honor, that there's no basis for treating  
21    her as a hostile witness. I mean, we've been cooperative  
22    here. She is a -- we're not a party to this case. There's  
23    been no showing that she should be treated as a hostile  
24    witness.

25            THE COURT: Well --

1 MR. HAYS: And I think at least that before Mr.  
2 Hutton takes off on her that there ought to be some showing  
3 that she's not being responsive to his questions.

4 THE COURT: I really -- let me back up. I'm using  
5 that -- I thought using that in the technical terms in the  
6 sense that I would permit Mr. Hutton to cross-examine her to  
7 ask mean questions. For me to say that he's to treat her as  
8 a witness who is not going to be responsive --

9 MR. HAYS: I understood the connotation, Your  
10 Honor, was that Your Honor's intent -- but I would submit,  
11 Your Honor, that typically you don't allow someone to ask  
12 leading questions of a witness until there has been some  
13 showing of -- I mean, that's the hostile witness --

14 THE COURT: I understand. The problem is that we  
15 have -- I'm making an exception here, because there has --  
16 and I don't want to get into whose fault anything is. But  
17 there has not been a deposition taken of the witness. I  
18 think it's going to move things along faster.

19 Certainly, if there are leading questions and then  
20 there are questions that get beyond that -- and I'm going to  
21 be very attuned to that -- and I will be asking you,  
22 certainly -- I'll say that right now, to the extent that you  
23 can, don't ask leading questions. All right.

24 To the extent that you're getting responsive  
25 answers, just ask the question straight up. But if you have

1 to follow up with something -- and I'm recognizing that you  
2 haven't had the chance to depose her -- I'm going to be very  
3 lenient in terms of allowing it to shift into leading  
4 questions.

5 But you're absolutely right, Mr. Hays. We have no  
6 reason to believe that Ms. Swanson will be anything but  
7 perfectly cooperative. And I have no intention of having  
8 anybody felt uncomfortable, any more discomfort than is the  
9 nature of the business that we're doing here. And she is, I  
10 understand, being taken away from her very busy schedule.  
11 So I just have to do it. The issue is there. She's a  
12 witness. We're going to do it. Okay.

13 Anybody have anything more? I want to say one  
14 more thing very quickly; and that is, on the 31st of May, I  
15 was going to have a status conference. I'm going to cancel  
16 that, unless anybody has reason otherwise. 31 May is off.  
17 I didn't issue an order on that. But it was in the last  
18 transcript. All right. And you can report that to your  
19 seniors, also.

20 I see no reason for a status conference at this  
21 stage of the game, unless -- if one is required, I'll let  
22 you know. I will say no more. I appreciate, again,  
23 everybody responding this rapidly. I hope we don't have to  
24 do it again this rapidly. But after reading what Judge  
25 Jackson did to the Microsoft legal team set-up for the

1 weekend, I don't feel all that bad. But anyway, until next  
2 time.

3 (Whereupon, at 3:25 p.m., the hearing in the  
4 above-entitled matter was adjourned.)

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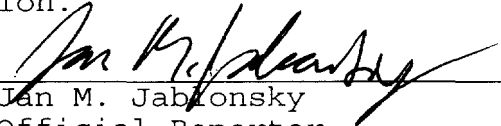
CASE TITLE: IN RE: READING BROADCASTING, INC.

HEARING DATE: MAY 25, 2000

LOCATION: Washington, DC

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Federal Communications Commission.

Date: 5-25-00

  
Jan M. Jablonsky  
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**TRANSCRIBER'S CERTIFICATE**

I hereby certify that the proceedings and evidence were fully and accurately transcribed from the tapes and notes provided by the above named reporter in the above case before the Federal Communications Commission.


Date: 5-31-00

  
Terri Mathews  
Official Transcriber  
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**PROOFREADER'S CERTIFICATE**

I hereby certify that the transcript of the proceedings and evidence in the above referenced case that was held before the Federal Communications Commission was proofread on the date specified below.

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